Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	**)** **)** **)**	**WC Docket No. 17-84**
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	**)** **)**	**WT Docket No. 17-79**

To: The Commission

REPLY TO OPPOSITIONS
TO PETITION FOR RECONSIDERATION
OF THE COALITION OF CONCERNED UTILITIES

Arizona Public Service Company, Berkshire Hathaway Energy, Eversource, Exelon Corporation, FirstEnergy, South Carolina Electric & Gas, and The AES Corporation (collectively, "the *Coalition of Concerned Utilities*" or "*Coalition*"), by their attorneys, hereby reply to the Oppositions filed November 9, 2018, in the above-captioned proceedings. In support of its Reply, the *Coalition* states as follows.

I. INTRODUCTION

The *Coalition's* goals align with those of the Commission. Like the Commission, the *Coalition* seeks to improve the process for attachments to electric distribution poles while permitting utility pole owners to safely and efficiently deliver electric services. These common goals are consistent with the public interest.

Pole attachments issues are complex, with many interested parties, issues and moving parts. To achieve our common goals, one set of attachers should not benefit at the expense of another, accidental deaths and injury must be prevented, the integrity of electric distribution systems must be protected, newly-imposed regulations must be reconciled with conflicting

regulations and the Pole Attachment Act, efficiencies should be added to speed deployment, and unnecessary roadblocks to future broadband deployment should be eliminated.

II. REPLY TO OPPOSITIONS

A. The Public Interest Requires Further Analysis of the New Rules

Several parties request that certain arguments raised in the Petition for Reconsideration be rejected, alleging they were addressed already or should have been raised earlier.[1] These allegations are mistaken, and numerous public interest considerations compel their review.

Section 1.429(b)(3) of the Rules specifies that petitions relying on facts or arguments not previously presented to the Commission may be granted if the Commission determines that consideration of such facts or arguments are required in the public interest, and consideration of these facts and arguments certainly are.[2] None of the August 3 Order's final rules appeared as proposed rules in the April 21, 2017 Notice of Proposed Rulemaking[3] or in the November 29, 2017 Further Notice of Proposed Rulemaking,[4] so that reconsideration is the first real opportunity for the parties to address the new rules and to propose additional changes.[5]

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[1] *See* Opposition of the USTelecom Association at 2 (Filed Nov. 9, 2018) ("*USTelecom Opposition*"); Opposition of AT&T Services, Inc. at 3 (Filed Nov. 9, 2018) ("*AT&T Opposition*"); Opposition of Verizon at 2 (Filed Nov. 9, 2018) ("*Verizon Opposition*"); Opposition of NCTA at 2 (Filed Nov. 9, 2018) ("*NCTA Opposition*"); Opposition of the Fiber Broadband Association at 2 (Filed Nov. 9, 2018) ("*FBA Opposition*"); Opposition of the American Cable Association at 2-3 (Filed Nov. 9, 2018) ("*ACA Opposition"*).

[2] 47 C.F.R. § 1.429(b)(3) (2018). The new regulations promulgated by the August 3 Order will affect the deployment of broadband services, 5G wireless services, and other telecommunications services. They will affect the safety and reliability of electric distribution systems, and they currently conflict with existing rules and the Pole Attachment Act. The public interest requires these new regulations to be fully vetted and further modified to ensure they work as well as they should.

[3] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, "Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment," 32 FCC Rcd 3266 (2017).

[4] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, "Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking," 32 FCC Rcd 11128 (2017).

[5] As identified below, other arguments in the Petition were raised earlier by the *Coalition* but were not addressed at all by the Commission, much less fully considered and rejected. In addition to the public interest justifying an examination of the Petition's new facts and arguments, Section 1.429(b)(2) of the Rules supports the Commission's review because the facts and arguments were unknown to the *Coalition* until after its last opportunity to present them to the Commission. 47 C.F.R. § 1.429(b)(2). In its Opposition, ACA repeatedly claims the *Coalition* had its

B. Rules Pertaining to the ILEC/Electric Utility Joint Use Relationship Should Be Modified in the Public Interest

In its Petition, the *Coalition* argued that to encourage ILECs to negotiate new agreements similar to third party CLEC agreements, the August 3 Order's new presumption that ILECs receive the new Telecom Rate should be limited to "newly negotiated" agreements, and not apply to "newly renewed" agreements.[6]

None of the Oppositions addressed this proposal, much less explained why ILECs should not be subject to terms and conditions similar to those in CLEC agreements. They simply question again whether their existing joint use agreements provide them net benefits over their CLEC competitors, but these issues go away, along with the prospect of FCC litigation, if ILECs adopt new agreements similar to third party CLEC agreements.[7]

The *Coalition* requested the Commission reconsider its decision to cap the ILEC attachment rate at the old pre-2011 Telecom Rate, arguing that the advantages given ILECs under joint use agreements justifies a rate much higher than the pre-2011 Telecom Rate.[8]

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chance to comment on these issues when the Commission released its draft order a few weeks before the August 3 Order. *ACA Opposition* at 2, 8-9, 11, 12, 14, 16, 19, 22-23. The draft order, however, was not a Notice of Proposed Rulemaking which accords a reasonable amount of time for comments and reply comments. It was not published in the Federal Register as is required of NPRMs by the Administrative Procedure Act (5 U.S.C. § 553 (b)(3)). Because it was not an NPRM, the great number of issues raised by the draft order, the brief amount of time to consider them, and the lack of a pleading cycle made it impossible for any party to properly address any of those issues. And in material respects, the draft order differed greatly from the August 3 Order now being addressed. Even with respect to the August 3 Order, an argument exists that the Administrative Procedure Act is violated without additional review because the final rules in the August 3 Order arguably are not a "logical outgrowth" of the April 21, 2017 NPRM or the November 29, 2017 FNPRM. The NPRM and FNPRM did not expressly ask for comments on these exact regulations that were promulgated and arguably did not otherwise make clear the FCC was contemplating these particular changes. *CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1081 (D.C. Cir. 2009).

[6] *Coalition Petition for Reconsideration* at 5.

[7] The Oppositions similarly did not address, much less refute, the *Coalition's* common-sense argument that since existing joint use agreements were negotiated based on a complete set of joint use terms and conditions, any modification of the ILEC rate provision requires a new look at all other provisions. *See AT&T Opposition* at 2-6; *USTelecom Opposition* at 2-11; Opposition of NTCA-The Rural Broadband Association at 2-3 (Filed Nov. 9, 2018) ("*NTCA Opposition*").

[8] *Coalition Petition for Reconsideration* at 4-7.

Several parties disagreed,[9] but if a utility proves the rate should be higher than the pre-2011 Telecom Rate, then such a cap would give the ILEC an advantage over its competitors.[10]

Similarly, none of the Oppositions realistically dispute that ILECs being charged a low regulated rate would have an advantage of their electric utility joint use partners which must pay whatever rate the ILEC wants.[11]

C. Self-Help in The Electric Space Should Never Be Allowed

Responding to the August 3 Order's alarming decision to allow self-help in the electric space, the *Coalition* explained that the Order's safeguards are insufficient.[12] Only two Oppositions addressed this radical electric space self-help remedy, both failed to respond to the serious concerns raised by the *Coalition*, and instead both simply expressed their unfounded

[9] *See AT&T Opposition* at 2-6; *USTelecom Opposition* at 2-11; *NTCA Opposition* at 2-3.

[10] The *Coalition* asked to remove the presumption that ILECs be entitled to the new Telecom Rate because the Commission's decision is based on the assumption that a disparity in pole ownership somehow creates bargaining leverage for electric utilities. As the Petition explained, bargaining leverage oftentimes cannot exist even with a pole disparity. *Coalition Petition for Reconsideration* at 5, n.15. None of the Oppositions addressed the *Coalition's* arguments that a disparity in pole ownership does not lead to bargaining power and forms no basis for entitling ILECs to a lower rate. This presumption should therefore be removed.

[11] The *Coalition* requested the Commission to clarify what rate ILECs can charge electric utilities to attach to ILEC poles, and proposed that any percentage reduction in the fees ILECs pay to electric utilities should be matched by the same percentage reduction in what electric utilities pay ILECs. *Coalition Petition for Reconsideration* at 7. After all, electric utilities should not be short-changed in the process of equalizing communications company rates. None of the Oppositions disputed that the guidance provided to date is incomprehensible, that ILECs should not be permitted to charge whatever they want, that rates must be fair to promote a constructive joint use relationship, or that electric utility customers should not be required to subsidize ILECs. And none of the Oppositions offered a better solution than what the *Coalition* proposes. AT&T claims that lowering the rate ILECs charge electric utilities merely because electric utilities lower the rates they charge ILECs would not be reasoned decision-making, but it is far better reasoned decision-making than lowering the rates electric utilities charge ILECs without addressing at all the rate ILECs charge electric utilities. *AT&T Opposition* at 6. To eliminate disputes about what rate ILECs can charge electric utilities, and to be fair, the Commission should grant the *Coalition's* proposal.

[12] *Coalition Petition for Reconsideration* at 8-9, claiming they are insufficient because: (i) electric space work is inherently more hazardous than communications space work; (ii) communications companies lack the training and expertise to oversee this work; (iii) crew availability is often a problem; and (iv) the ad hoc oversight afforded electric utilities (and without reimbursement) is insufficient to ensure the work is performed safely. Even the Broadband Deployment Advisory Committee did not recommend any self-help remedy in the electric space. *See* Report of the Competitive Access to Broadband Infrastructure Working Group, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 at 6 (Filed Jul. 3, 2017) at 42-50.

belief that the Order's safeguards would be sufficient.[13] But the mere hope that the Order's safeguards will work is insufficient to compel electric utilities to cede control over their electric space. As the *Coalition* explained (and no Opposition addressed), this provision is so objectionable that utilities may divert resources from optional tasks like replacing poles in order to ensure the deadlines can be met. Such an unfortunate result would of course be inconsistent with our common goals to promote the efficient rollout of 5G wireless and broadband services.

This electric space self-help provision is highly objectionable and should be removed.

D. Additional Control Over Overlashing Is Needed to Protect Future Attachers, the Public, and Everyone Working on the System

The *Coalition* explained how the Commission overlooked the *Coalition's* substantial evidence regarding the public safety and pole loading problems associated with overlashing.[14] In response, the American Cable Association boldly claims this evidence is "questionably relevant,"[15] and that ignoring this evidence is not a "mistake or material error" in the Order.[16]

This type of cavalier attitude about dangerous conditions and congested poles caused by overlashing is why we have such a big problem right now.[17] To protect future attachers, utilities should have the ability to supervise overlashing as the *Coalition* proposed.[18]

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[13] *Verizon Opposition* at 9-11; *ACA Opposition* at 4-7.

[14] *Coalition Petition for Reconsideration* at 10-13.

[15] *ACA Opposition* at 7.

[16] *Id*. at 8.

[17] ACA notes the *Coalition* thanked the Commission one week before the final order for responding to utility concerns about overlashing, and faults the *Coalition* for not making its reconsideration proposals at that time. *Id.* at 8-9. But the draft Order regarding overlashing was drastically modified in the final Order, which pushed aside the *Coalition's* concerns entirely and required utilities to allow overlashing with little meaningful oversight. The *Coalition's* Reconsideration Petition is the first opportunity to address these last-minute decisions to strip away utility authority to require loading studies, P.E. certifications, information about what is being overlashed, and even to be reimbursed for post-overlash inspections.

[18] As the *Coalition* explained, it is unfair that the dangerous and poor overlashing practices of existing attachers be allowed to burden future attachers. *Coalition Petition for Reconsideration* at 12. None of the Oppositions addressed this equity argument.

The *Coalition* explained in no uncertain terms that allowing attachers to overlash when there are preexisting safety violations can be life-threatening and that the new rule allowing such overlashing must be eliminated or changed.[19] The Oppositions addressing this issue failed to recognize this ruling is life-threatening.[20] It therefore bears repeating that allowing a communications contractor (not even utility-approved) to overlash cable located too close to energized facilities risks fatal electrocution.[21] Such a reckless practice cannot be permitted.[22]

E. The Pre-Existing Violation Rules Conflict With the Act, Must Be Reconciled with Existing Rules, and Should Be Modified to Resolve Uncertainties About Cost Causation

The *Coalition* explained that the August 3 Order's ruling compelling immediate access to red-tagged poles is inconsistent with the Pole Attachment Act, because utilities cannot be required to expand capacity by replacing poles with taller poles, as occurs when violations are corrected.[23] The Oppositions addressing this issue seem similarly confused.[24] The Commission should therefore clarify that its ruling does not require premature pole replacements, or reject the ruling if it does.

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[19] *Id.* at 11-12.

[20] *Verizon Opposition* at 8-9; *NCTA Opposition* at 3-6; *FBA Opposition* at 6-9; *ACA Opposition* at 7-10.

[21] It also defeats the purpose of the NESC's 40-inch Communications Worker Safety Zone.

[22] In order to preserve valuable loading capacity on poles, the *Coalition* proposed that unused overlashing be removed when overlashing occurs. *Coalition Petition for Reconsideration* at 13. Only Verizon addressed this proposal, contending unused facilities should not be removed because "it often makes economic sense" to leave them there. *Verizon Opposition* at 9. But while it may make economic sense for Verizon, it makes far less economic sense for new attachers, which must bear the much greater expense of having to replace poles because poles remain loaded with these unused facilities.

[23] *Coalition Petition for Reconsideration* at 14.

[24] Verizon claims the ruling does not require pole replacements, but that is often why these poles are red-tagged. *Verizon Opposition* at 12-13. The Fiber Broadband Association claims the Order does not mandate that utilities replace poles to expand capacity prematurely, but the Order indicates otherwise. *FBA Opposition* at 10-11; *Third Report and Order* at n. 455. ITTA asks the Commission to require the replacement of red-tagged poles within a certain amount of time, but that would mandate capacity expansions in violation of the Pole Attachment Act. Opposition of ITTA-The Voice of America's Broadband Providers at 6-7 (Filed Nov. 9, 2018) ("*ITTA Opposition*").

The *Coalition* requested clarification that "even while [section] 1.411(d)(4) prevents the new attacher from being charged by the utility for the costs to replace a pole with a preexisting violation, the new attacher retains a reimbursement obligation to existing attachers or the owner under section 1.1408(b)" to cover its access to the replaced pole.[25] ITTA supports the *Coalition*'s requested clarification,[26] and Verizon and ACA appear confused.[27] The Commission should therefore clarify these provisions as requested by the Petition.[28]

F. Pole-by-Pole Make-Ready Estimates Should Be Paid for by Those They Benefit

The *Coalition* argued that new attachers requesting pole-by-pole estimates should bear the extra time and expense to prepare them.[29] None of the Oppositions objected that utilities should not have more time. Verizon and the Fiber Broadband Association object to having to pay for the pole-by-pole estimates,[30] but they make no effort to explain why it is fair that electric utility pole owners pay when the estimate solely benefits the attachers requesting it.[31]

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[25] *Coalition Petition for Reconsideration* at 16.

[26] *ITTA Opposition* at 8.

[27] Verizon states without explanation that there is no conflict between the two rules. *Verizon Opposition* at 13-14. ACA interprets the two rules to mean that only section 1.411(d)(4) should be enforced, but that improperly would render Section 1.1408(b) meaningless. *ACA Opposition* at 12.

[28] Because it is difficult to determine who might have caused safety violations, the *Coalition* proposed several common-sense and fair methods to allocate such costs, so if the violator cannot be determined, parties can require the costs of correcting the violation be paid by an unauthorized attacher, if any, or otherwise be shared by any communications company that reasonably might have caused the violation. *Coalition Petition for Reconsideration* at 16-17. ITTA agrees with these *Coalition* proposals (*ITTA Opposition* at 8-9). The other comments are unpersuasive. Verizon claims it makes no sense to require a party to pay for another's preexisting violation, but fails to recognize these solutions would apply only when whoever caused the violation cannot be determined. *Verizon Opposition* at 14. ACA simply claims the Commission is not required to address every proposal any party makes *ACA Opposition* at 13. The *Coalition's* proposals resolve a difficult attachment issue equitably and efficiently and should therefore be adopted.

[29] *Coalition Petition for Reconsideration* at 18.

[30] *Verizon Opposition* at 15; *FBA Opposition* at 12-13.

[31] The Fiber Broadband Association agrees with the *Coalition* that such costs cannot be recovered through the annual rental rate. *FBA Opposition* at 13.

G. The Joint Ride Out Process Should Be More Efficient

The *Coalition* proposed that attachment applications identify existing attachers because pole owners often do not know who is attached to their poles, explained that three-days' notice for joint ride-outs is inefficient and counterproductive, and requested joint ride-outs be optional because many new attachers do not want them.[32] Rather than address these operating realities and make the process workable and efficient, the few Oppositions addressing joint ride-outs disregard these operating realities.[33] The *Coalition's* solutions should therefore be adopted.

H. The Commission Should Resolve the Double Wood Problem

The *Coalition* explained the nationwide double wood problem and proposed hiring a utility-approved contractor to perform transfers to solve the problem.[34] No party objected.[35] The *Coalition* would support the Commission fixing this double wood issue now or in a future pole attachment order, and appreciates that others recognize this is a significant issue the Commission can resolve.

I. The Commission Should Balance The *Coalition's* Proposals With Attacher Objections to Improve the Contractor Selection Process

The *Coalition* proposed a number of ways the contractor rules should be improved, including: (i) utilities should not be required to maintain lists of qualified contractors to work in the communications space; (ii) a Professional Engineer stamp should accompany all survey and construction work; (iii) utilities should be entitled to require a "ramp-up" period to evaluate new contractors; (iv) electric utilities should be able to veto any contractor doing electric space

[32] *Coalition Petition for Reconsideration* at 19.

[33] *See Verizon Opposition* at 7; *ACA Opposition* at 16-17.

[34] *Coalition Petition for Reconsideration* at 19-20.

[35] Verizon did not object, except to say the Commission could resolve this issue in a future ruling consistent with the series of pole attachment orders it has issued thus far. *Verizon Opposition* at 16. ITTA supports the concept of rules to eliminate double wood, but suggests certain parameters. *See ITTA Opposition* at 9-10.

make-ready work on electric or ILEC poles; and (v) attachers hiring non-union personnel should reimburse the utility for union contract costs that arise because union workers were not used.[36]

Verizon, ITTA and ACA object to these proposals for various reasons, and space constraints do not allow a full reply.[37] The *Coalition* requests simply that the Commission balance the *Coalition's* requests with the objections raised in order to improve this contractor selection process in the public interest.

J. The One-Touch Make-Ready Rule Should Be Tweaked For Safety Reasons

While generally supporting one-touch make-ready, the *Coalition* identified the need for a Professional Engineer to certify the make-ready work is in fact "simple," and requested more time to participate in surveys, to review applications, and to monitor construction work.[38] Neither of the two Oppositions addressing these proposals is convincing,[39] and the *Coalition's* common-sense workable proposals should therefore be adopted.

K. More Time Is Needed to Review Whether Applications Are Complete

The *Coalition* requested an additional five business days to review applications, and additional time for *force majeure* events, for logistical reasons and because failure to meet the deadline renders the application complete.[40] The Fiber Broadband Association presumes without justification that these five extra days are unnecessary, and argues any relief for *force*

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[36] *Coalition Petition for Reconsideration* at 20-22.

[37] *See Verizon Opposition* at 11-12; *ITTA Opposition* at 10-12; *ACA Opposition* at 17-20.

[38] *Coalition Petition for Reconsideration* at 22-24.

[39] Verizon objects that the mere preference for longer timeframes does not justify longer timeframes. *Verizon Opposition* at 6-7. The Fiber Broadband Association contends that *Coalition* did not support its assertion that communications contractors were unqualified to determine whether OTMR is simple. *FBA Opposition* at 4. In response, the *Coalition* notes that pages 8-9 and footnotes 21 and 23 of the Petition fully explain the difference between communications contractor and electric contractor qualifications, and how communications contractors are not qualified. As for the *Coalition's* justification for these longer timeframes, they were (and continue to be) to "promote a more efficient and reliable process," which the Commission should consider in the public interest.

[40] *Id*.

majeure events is subject to abuse.[41] But consistent with its other proposals, the *Coalition* is not trying to delay the process but instead is respectfully proposing to make this deadline more consistent with operating realities, which the Commission should consider in the public interest.

III. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, the *Coalition of Concerned Utilities* urges the Commission to act in a manner consistent with the views expressed herein.

Respectfully submitted,

COALITION OF CONCERNED UTILITIES

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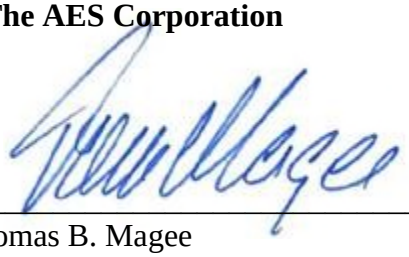
Berkshire Hathaway Energy
Eversource
Exelon Corporation
FirstEnergy
South Carolina Electric & Gas
The AES Corporation

By: 

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November 19, 2018

[41] *FBA Opposition* at 14-15. There is no indication that any of FBA's members have ever operated an electric distribution utility in order to gain such knowledge.

CERTIFICATE OF SERVICE

I, Timothy A. Doughty hereby certify that on November 19th, 2018, a true and correct copy of the foregoing Reply to Oppositions to the Petition for Reconsideration of the Coalition of Concerned Utilities was served on the parties listed below via U.S. First Class Mail:

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